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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 SEIU, LOCAL 2028,

12 Plaintiff,

13 vs.

14 RADY CHILDREN'S HOSPITAL, SAN  
DIEGO, and DOES 1 through 10,

15 Defendant.

CASE NO. 08cv486 BTM(AJB)

**ORDER GRANTING MOTION TO  
COMPEL ARBITRATION**

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17 Plaintiff SEIU, Local 2028 ("Local 2028") has filed a motion to compel arbitration. For  
18 the reasons discussed below, Local 2028's motion is **GRANTED**.

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20 **I. BACKGROUND**

21 **A. District Court Litigation**

22 On June 28, 2007, Rady Children's Hospital ("Rady") commenced Case No. 07cv1193  
23 BTM(AJB). In that case, Rady alleged that Local 2028 had ceased to exist as a result of a  
24 statewide SEIU restructuring plan and that the collective bargaining agreement ("CBA")  
25 between Local 2028 and Rady was therefore void. Rady also alleged that Local 2028 had  
26 effectively disclaimed its interest in the CBA and had unilaterally attempted to transfer its  
27 contract rights to SEIU, United Healthcare Workers - West ("UHW"), without complying with  
28 Section 1.05 of the CBA. Rady argued that due to the ineffective attempted assignment of

1 rights, Rady had no contractual obligations toward UHW.

2 In the original complaint, Rady asserted a declaratory relief claim and a breach of  
3 contract claim. In an order filed on November 26, 2007, the Court granted motions to dismiss  
4 brought by Local 2028 and UHW. The Court held that this case, when “stripped to  
5 essentials,” was representational and fell within the primary jurisdiction of the NLRB. See  
6 United Ass’n of Journeymen v. Valley Engineers, 975 F.2d 611, 614 (9th Cir. 1992). The  
7 Court explained, “Whether Local 2028 still exists after the merger with Local 221 and whether  
8 UHW has taken on the role of bargaining representative are questions that fall within the  
9 NLRB’s exclusive jurisdiction.”

10 Although the Court dismissed Rady’s Complaint, the Court granted Rady leave to file  
11 an amended complaint. On December 20, 2007, Rady filed its First Amended Complaint  
12 (“FAC”). For the most part, the FAC alleged the same facts as the original complaint and  
13 reasserted the causes of action for declaratory relief and breach of contract. The FAC also  
14 asserted additional causes of action for fraud in the inducement and violation of 29 U.S.C.  
15 § 462.

16 Based on the filing of the First Amended Complaint, Local 2028 and UHW filed  
17 motions for Rule 11 sanctions or, in the alternative, attorney’s fees under 28 U.S.C. § 1927.  
18 Subsequently, Rady made a motion to voluntarily withdraw the First Amended Complaint.  
19 Although the Court allowed Rady to voluntarily dismiss the First Amended Complaint, the  
20 Court granted the motions for sanctions on the ground that the breach of contract and  
21 declaratory relief claims were exactly the same as the claims that were previously dismissed  
22 by the Court. The Court also found that the additional claims “hinge[d] upon the  
23 determination of whether Local 2028 was and is a viable entity and the bargaining  
24 representative of the employees at Plaintiff’s hospital.” Accordingly, these claims also fell  
25 within the primary jurisdiction of the NLRB.

26 On March 14, 2008, Local 2028 commenced this action by filing a Petition to Compel  
27 Arbitration. Local 2028 seeks to compel arbitration of Local 2028’s grievance, which was  
28 filed on or about November 16, 2007. The grievance alleges that Rady violated various

1 provisions of the CBA by refusing to honor the recognition clause, denying access to Union  
2 representatives, denying employees the right to be represented by Union representatives,  
3 and threatening Union Stewards and employees who were engaged in exercising their  
4 contractual Union rights.

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6 B. NLRB Proceedings

7 In 2007 and 2008, Local 2028 filed unfair labor practice charges (“ULPs”) against  
8 Rady with the NLRB. In the ULPs, Local 2028 alleges that Rady has violated the NLRA by  
9 refusing to recognize and bargain with Local 2028 and by denying access to Local 2028's  
10 authorized representatives. (Exs. 1-4 to Overstreet Decl.)

11 On March 28, 2008, the NLRB issued an Order Consolidating Cases, Consolidated  
12 Complaint and Notice of Hearing (“NLRB Complaint”). (Ex. 6 to Overstreet Decl.) The NLRB  
13 Complaint alleges, among other things, that Rady refused to recognize and bargain with  
14 Local 2028 and refused to grant the Assistants to the Trustee of the Union access to Rady's  
15 facilities.

16 On April 11, 2008, Rady answered the NLRB Complaint. (Ex. 7 to Overstreet Decl.)  
17 Local 2028 requested that Rady withdraw the Answer and agree to arbitrate the underlying  
18 dispute. (Harland Decl. ¶ 3.) Rady refused on the ground that the “questions of  
19 representation [before the NLRB] are essential to your demand for arbitration.” (Ex. C to  
20 Harland Decl.)

21 On June 17, 2008, Rady entered into a settlement agreement with the NLRB.  
22 (Overstreet Decl. ¶ 8.) Under the terms of the settlement agreement, Rady agreed that it  
23 would recognize and deal with Local 2028 and grant access to the representatives appointed  
24 by the trustee of Local 2028. (Id. at ¶ 9.)

25 Local 2028 refused to enter into the settlement agreement because it believed that  
26 the remedy of a “Notice to Employees” being posted at the employer's facilities was  
27 insufficient redress for the alleged violations by the employer. Local 2028 appealed the  
28 settlement to the NLRB's Office of Appeals. (Id. at ¶¶ 12-13.)

1 After the instant motion was submitted on the papers, the Court was notified that the  
 2 NLRB had denied Local 2028's appeal and that the Regional Director had approved the  
 3 Settlement Agreement. (Exs. 1 & 2 to Stone Decl. dated 10/23/08.) Rady states that it will  
 4 now comply with the terms of the settlement and post the required notices. (Stone Decl.  
 5 dated 10/23/08, ¶ 5.)

## 6 7 **II. DISCUSSION**

### 8 **A. Motion to Compel Arbitration**

9 Local 2028 seeks to compel arbitration of its grievance against Rady. Rady opposes  
 10 Local 2028's motion on the grounds that (1) resolution of the motion hinges upon the  
 11 determination of whether Local 2028 is a viable entity and the bargaining representative of  
 12 the employees at Rady; (2) the motion to compel is moot because of the NLRB Settlement;  
 13 and (3) the motion is barred by the doctrines of judicial estoppel, law of the case, and  
 14 collateral estoppel. As discussed below, Rady's arguments lack merit.

15 Before the NLRB denied Local 2028's appeal of the settlement, Rady had a strong  
 16 argument that a stay of these proceedings was appropriate because the resolution of the  
 17 motion to compel would require the Court to rule upon representational issues that were  
 18 pending before the NLRB. See McClatchy Newspapers v. Central Valley Typographical  
 19 Union, 762 F.2d 741, 746 (9th Cir. 1985) (explaining that when a contractual issue before the  
 20 court is closely related to an unfair labor practice charge already before the NLRB, the district  
 21 court must exercise its discretion to determine whether the proceedings should be stayed  
 22 until final disposition of the NLRB proceeding). Specifically, the threshold issue of whether  
 23 Local 2028 could enforce the CBA was intertwined with the issues of whether Local 2028  
 24 was still a viable entity and whether the CBA was null and void. However, now that the  
 25 settlement has been approved and Rady has agreed to recognize and deal with Local 2028,  
 26 the Court no longer has to reach matters that are within the NLRB's primary jurisdiction.

27 The motion to compel has not been rendered moot by the NLRB settlement. The  
 28 NLRB proceedings concerned unfair labor practice charges whereas the grievance concerns

1 alleged violations of the CBA. Furthermore, the settlement agreement states that it does not  
2 “preclude persons from filing charges . . . and the courts from finding violations with respect  
3 to matters which precede the date of the approval of the Agreement . . . .” (Ex. 8 to  
4 Overstreet Decl.) If Rady breached the CBA, Local 2028 may be entitled to remedies  
5 beyond those provided in the settlement agreement.

6       The Court also rejects Rady’s argument that Local 2028’s motion should be denied  
7 pursuant to the doctrines of judicial estoppel, law of the case, and collateral estoppel. This  
8 case is a separate case from Case No. 07cv1193 BTM(AJB), and involves different claims.  
9 The Court did not make any rulings in Case No. 07cv1193 BTM(AJB) that preclude Rady  
10 from seeking to compel arbitration. In Case No. 07cv1193, the Court dismissed Rady’s  
11 claims because the claims raised representational issues that fell within the primary  
12 jurisdiction of the NLRB. In this case, the issue before the Court – i.e., whether to compel  
13 arbitration – does not require the Court to reach representational issues. If Rady contends  
14 that despite the NLRB settlement agreement, the merits of Local 2028’s grievance require  
15 the resolution of representational issues, Rady can advance that argument before the  
16 arbitrator. Similarly, what effect, if any, the NLRB settlement agreement has on Local 2028’s  
17 grievance should be determined by the arbitrator.

18       Local 2028’s grievance falls within the scope of the CBA’s broad grievance and  
19 arbitration clause, which provides: “[a]ny complaint or dispute arising between a Bargaining  
20 Unit employee and/or the Union and the Employer concerning the conduct of the Employer  
21 alleged to be in violation of an express provision of this Agreement shall be resolved by the  
22 filing of a grievance in accordance with this Article.” Therefore, the Court grants Local 2028’s  
23 motion to compel arbitration. See United Steelworks of America v. Warrior & Gulf Navigation  
24 Co., 363 U.S. 574, 582-83 (1960) (explaining that a motion to compel arbitration of a  
25 grievance should not be denied “unless it may be said with positive assurance that the  
26 arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”)

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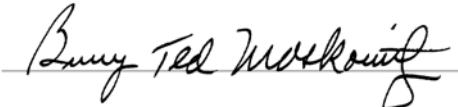
1 B. Attorney's Fees

2 Local 2028 seeks an award of attorney's fees on the ground that Rady frivolously  
3 and/or in bad faith refused to submit to arbitration. See UFCW v. Alpha Beta Co., 736 F.2d  
4 1371, 1381 (9th Cir. 1984). The Court denies Local 2028's request for attorney's fees. Prior  
5 to the approval of the settlement agreement, there were unresolved questions regarding  
6 whether Local 2028 was a viable entity and whether the CBA was null and void. These  
7 unresolved questions bore upon whether Local 2028 could enforce the CBA. The settlement  
8 agreement was not approved until after the motion to compel was submitted. Therefore, the  
9 Court finds that Rady's refusal to arbitrate was not in bad faith or based on frivolous  
10 arguments.

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12 **III. CONCLUSION**

13 For the reasons discussed above, Local 2028's Motion to Compel Arbitration is  
14 **GRANTED**. Rady is **ORDERED** to submit to arbitration of Local 2028's grievance. Local  
15 2028's request for attorney's fees is **DENIED**. The Clerk shall enter judgment accordingly.  
16 **IT IS SO ORDERED.**

17 DATED: December 12, 2008

18   
19 Honorable Barry Ted Moskowitz  
20 United States District Judge  
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